Supreme Court, U.S.
FILED
04-734 NOV 24 2004
OFFICE OF THE CLERK

No.

In the
Supreme Court of the United States

WALLY YARACS,

Petitioner,

vs.

SUMMIT ACADEMY AND C.S.C. ACADEMY, INC.,
THE TOWNSHIP OF SUMMIT, BUTLER COUNTY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

Christine M. Nebel, Esquire
Counsel of Record
220 South Washington Street
Butler, PA 16001
(724)285-1462
Attorney for Petitioner

RECEIVED
NOV 30 2004
OFFICE OF THE CLERK
SUPREME COURT, U.S.

QUESTIONS PRESENTED

1. Do due process requirements mandate that a party must be afforded due process prior to being deprived of property rights?

2. Were the due process rights of Petitioner violated by the fraudulent actions of a party including the frivolous filing of a federal law suit and the failure of said party to inform the district court judge of the prior state court proceeding involving the same issue?

3. Should a Settlement Agreement adopted by the district court be voided since the Settlement Agreement was not properly ratified by the Township Supervisors and since the effect of the Settlement Agreement circumvents Pennsylvania Zoning Law?

PARTIES TO THE PROCEEDING

The parties are:

Petitioner: Wally Yaracs, (Mr. Yaracs), an individual

Respondent: Summit Academy and C.S.C. Academy, Inc. ("Summit Academy"), a non-governmental corporate party to the proceedings before the Court of Common Pleas of Butler County, the Commonwealth Court of Pennsylvania and the Supreme Court of Pennsylvania. Petitioner states that Summit Academy is a fictitious name and C.S.C. Academy, Inc., is a parent corporation for Summit Academy and is not a publicly-traded corporation.

Respondent: The Township of Summit is a Township in the Commonwealth of Pennsylvania and is a party to the proceedings before the Court of Common Pleas of Butler County, the Commõnwealth Court of Pennsylvania and the Supreme Court of Pennsylvania.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 7

CONCLUSION 14

APPENDIX

SUPREME COURT OF PENNSYLVANIA ORDER 1a
COMMONWEALTH COURT OPINION 2a
COURT OF COMMON PLEAS OPINION AND ORDER ... 15a
COURT OF COMMON PLEAS 23a
MEMORANDUM OPINION

TABLE OF AUTHORITIES

Atlantic Freight Lines v. Pennsylvania Public Utility Commission, ... 10
109 F.Supp. 385 (W.D.Pa. 1952)

Bougher v. University of Pittsburgh, ... 11
882 F.2d 74, 78 (3d Cir. 1989)

Butcher v. Bloom, 415 Pa. 438, 203 A.2d 556 (1964) 8

Goehring v. Harleysville Mutual Casualty Company, ... 8
460 Pa. 138, 331 A.2d 457 (1975)

Lambert v. Blackwell, 134 F.3d 506, 513 n. 18 10
(C.A.3d. 1997)

Owens v. Okure, 488 U.S. 235, 236 109 S.Ct. 573, 574, ... 11
102 Id. 2d. 594 (1989)

Princess Lida of Thurn and Taxis v. Thompson, ... 8
305 U.S. 456, 59 S.Ct. 275, 83 L.Ed. 285 (1939)

Thompson v. FitzGerald, 329 Pa. 497, 198 A. 58 (1939) 8

Wolgin v. State Mutual Investors, 265 Pa.Super. 525, ... 9, 10
402 A.2d 669 (1979)

STATUTES

28 U.S.C.A. Section 1257 2

42 U.S.C.A Section 1983 11

42 Pa. C.S.A. Section 5524 11

65 Pa. C.S.A. Section 1102, 1103(a) 12

IN THE
SUPREME COURT OF THE UNITES STATES

WALLY YARACS,

Petitioner,

vs.

SUMMIT ACADEMY AND C.S.C. ACADEMY, INC.;
THE TOWNSHIP OF SUMMIT, BUTLER COUNTY,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

Wally Yaracs, Petitioner, by undersigned counsel, under appropriate rules of this Court requests that this Court issue a writ of certiorari to the Supreme Court of Pennsylvania.

OPINIONS BELOW

The original action in this matter began as a Petition for Declaratory Judgment filed by Wally Yaracs against Summit Academy, C.S.C. Academy, Inc. and the Township of Summit, Butler County, Pennsylvania on May 31, 2002 in the Court of Common Pleas of Butler County, Pennsylvania. Said Petition requested that the Court of Common Pleas of Butler County declare a Settlement Agreement adopted on May 1, 2002 between the Summit Township Board of Supervisors and Summit Academy be declared void for several reasons.

The Court of Common Pleas of Butler County, Pennsylvania granted Preliminary Objections filed by Defendant, Summit Academy and found that the Court lacked subject matter jurisdiction over the Petition for Declaratory Judgment. An appeal was taken of that decision and the Commonwealth Court of Pennsylvania affirmed the decision of the Court of Common Pleas of Butler County. A Petition for Allowance of Appeals was filed with the Supreme Court of Pennsylvania and on August 26, 2004 said Petition was denied.

JURISDICTION

Jurisdiction of this Honorable Court is invoked under 28 U.S.C.A. Section 1257.

STATEMENT OF THE CASE

Summit Academy purchased a parcel of land in Summit Township, Butler County, Pennsylvania in May 1996 for the purpose of establishing a residential juvenile correctional facility. The facility purchased by Summit Academy is not capable of housing more than 350 juvenile offenders and at no time has Summit Academy had more than 350 juvenile offenders at their property. Summit Academy has been engaged in various litigation with Summit Township regarding violations by Summit Academy of the Township's Zoning Ordinance.

In March of 2000, during the pendency of some of the litigation regarding Summit Academy's violations of the original Zoning Ordinance, Summit Academy filed a Building Permit Application No. 24082 requesting a permit to construct additional dormitory buildings. Said Building Permit Application No. 24082 was denied by the Summit Township Permit Officer and Summit Academy appealed that determination. Due to other litigation pending between Summit Academy and Summit Township, there was a delay in scheduling a hearing on that appeal.

During that delay, the then Summit Township Supervisors negotiated with Summit Academy regarding a comprehensive settlement of the outstanding issues between the parties. Said negotiations were kept a secret for a number of months until February 19, 2001 at which time the text of the proposed agreement which had been negotiated between Summit Academy and the Township was published in the special notices section of the local newspaper, The Butler Eagle. Said Notice advised that the proposed Settlement Agreement was to be considered by the Summit Township Supervisors at their meeting two days later, on February 21, 2001 and that an informational public meeting was being held the following day on February 20, 2001.

The proposed Settlement Agreement of February 2001 was in a number of respects similar to the one ultimately adopted by two of the Supervisors on May 1, 2002, and adopted as a Consent Decree by a federal district court judge, however, the February 2001 Agreement provided for a maximum of 700 juvenile offenders at the facility by January 2009. The May 1, 2001 Settlement Agreement which was ultimately adopted provides for a maximum of 1200 juvenile offenders at the facility. In an article dated February 20, 2001, in the Butler Eagle published the morning of the informational public meeting being held on February 20, 2001, one of the Supervisors, John Oesterling, indicated that he planned to vote in favor of the settlement proposal.

On February 20, 2001, at the public informational meeting, virtually all of the approximately 200 people attending that meeting opposed the proposal to settle the litigation. Not one individual indicated that they were in favor of accepting the proposed agreement. The following day at the Supervisors's meeting on February 21, 2001, the Summit Township Supervisors rejected the proposed agreement with Summit Academy, with all three Supervisors voting against the proposal including Supervisor Oesterling who had previously indicated that he intended to vote in favor of the agreement.

After these settlement negotiations failed, subsequently there was a hearing held before the Summit Township Zoning Hearing Board related to Summit Academy's denial of its Building Permit Application No. 24082. At that time, nine individual residents of Summit Township, including Petitioner, Mr. Yaracs, filed an Appearance and were made parties to that proceeding. That hearing was held on January 21, 2002.

At the hearing, the solicitor for Summit Township and counsel for Summit Academy made legal arguments to the Zoning Hearing Board with regard to their positions. At that time, counsel for Summit Township vigorously argued that the Permit Officer properly denied the Building Permit Application filed by Summit Academy in March of 2000. The solicitor for the Zoning Hearing Board requested counsel for Summit Township and Summit Academy to submit briefs to the Zoning Hearing Board prior to the decision by the Zoning Hearing Board which was scheduled for April 10, 2002. Both counsel filed briefs with the Zoning Hearing Board, including the detailed arguments by Summit Township

Solicitor in support of the Permit Officer denying the Building Permit to Summit Academy. All parties were aware that on April 10, 2002, the Summit Township Zoning Hearing Board was to meet and issue a decision with regard to whether the Building Permit was properly denied.

Thirteen days prior to the scheduled announcement by the Zoning Hearing Board of its decision, Summit Academy, on March 28, 2002 filed a civil rights action against the Township in the Federal District Court for the Western District of Pennsylvania. An article appeared in the Butler Eagle on April 3, 2002 indicating that Summit Academy had filed the law suit in federal court for "an unspecified amount of damages." Said article did not indicate that the Complaint had asked for any injunctive or other equitable relief, but merely, "an unspecified amount of damages."

The Supervisors in office at the time of the vote of February 21, 2001 included two of the Supervisors who are presently in office, Supervisor John Oesterling and Supervisor Regis Karch. The other Supervisor did not run for re-election and retired after his term expired in early 2002. In the fall of 2001, there was an election contest for the open position on the Summit Township Board of Supervisors. The individual elected for the third Supervisor's seat was Harold Schnur who has a conflict of interest with regard to any matter related to Summit Academy due to financial interests his family member has with Summit Academy.

The federal civil rights law suit was filed clearly to intimidate the Supervisors of Summit Township to agree to a settlement which was not in the Township's best interests. Since nine individual property owners had become parties to the Zoning Hearing Board litigation, Summit Academy needed to have another law suit pending so that they could intimidate the Supervisors into an agreement which was not in the Township's best interest. The federal civil rights complaint filed by Summit Academy on March 28, 2002 was clearly frivolous. Most of the allegations in the Complaint were well beyond the applicable Statute of Limitations. Further, the timing of the Complaint was clearly filed in order to intimidate both the Township Zoning Hearing Board and Summit Township Supervisors. Further, Summit Academy was aware that the newly elected Supervisor, Harold Schnur, who clearly had a conflict of interest with regard to any matter related to Summit Academy, would vote in favor of any Settlement Agreement which favored Summit Academy. With that Supervisor on their

side, Summit Academy knew that they only needed to intimidate one of the other two Supervisors in order to obtain a favorable settlement.

At the April 10, 2002 meeting of the Summit Township Zoning Hearing Board, the Zoning Hearing Board announced its decision in favor of Summit Academy. Apparently, within a couple of days after that announcement, the Supervisors through their legal counsel had a telephone conversation with Summit Academy with regard to a possible Settlement Agreement regarding the federal law suit. A second telephone conversation took place on May 1, 2002 prior to a regularly scheduled Supervisors Meeting. At the Supervisors' Meeting on May 1, 2002, Supervisor Harold Schnur made a Motion to Pass a Resolution to Settle the Federal Court Litigation. Said Motion was made without Supervisor Schnur revealing his conflict of interest with Summit Academy which is in violation of the Public Official and Employees Ethic Act of Pennsylvania. Supervisor John Oesterling also voted in favor of the resolution and the third Supervisor, Regis Karch, abstained.

No prior public notice was given by the Supervisors of their intention to consider any Settlement Agreement at the Supervisors' Meeting despite the fact that they knew of the great interest of the residents of Summit Township regarding this issue as evidenced by the events occurring in February 2001 regarding the prior proposed Settlement Agreement. The Settlement Agreement agreed to by the Supervisors on May 1, 2002 is significantly less favorable to Summit Township as it allows 1200 juvenile offender residents at the property rather than the prior proposed Settlement Agreement which only provided 700 juvenile offender residents. At the Supervisors' meeting on May 1, 2002, legal counsel for the Supervisors indicated that two telephone conversations had taken place between the Supervisors and legal counsel with regard to the negotiation of the agreement prior to Board of Supervisors meeting that evening.

Petitioner, Mr. Yaracs, filed a Notice of Zoning Appeal to the April 10, 2002 decision of the Summit Township Zoning Hearing Board with the Court of Common Pleas of Butler County, Pennsylvania and said appeal was denied by the Court of Common Pleas of Butler County, the Commonwealth Court of Pennsylvania and a Petition for Allowance of Appeal was denied by the Supreme Court of Pennsylvania. The basis for the denial by all of the state courts was that they did not have jurisdiction to

rule on the merits of the appeal in light of the Settlement Agreement which was adopted by the federal district court as a Consent Order terminating the federal law suit.

One of the provisions of the Settlement Agreement of May 1, 2002 which was adopted by the district court as an order on May 2, 2002 is Paragraph 4 of the agreement which provides that the Building Permit Application No. 24082 dated March 13, 2000 is approved. That is the same Building Permit Application which was the basis of the appeal to the decision of the Zoning Hearing Board of April 10, 2002. Neither Mr. Yaracs nor any of the other nine individuals who filed appearances and were parties to the Zoning Hearing Board decision were parties to the secret negotiations between Summit Academy and the Township which resulted in the settlement including the issuance of the Building Permit.

On May 30, 2002, Mr. Yaracs filed a Petition to Intervene and Motion to Vacate Consent Order with the United States District Court for the Western District of Pennsylvania. Ultimately the District Court Judge denied the Motion to Intervene and made no ruling on the Motion to Vacate Consent Order. On June 5, 2003, the panel for the United States Court of Appeals for the Third Circuit affirmed the decision of the District Court Judge. The Court of Appeals on July 11, 2003 denied the Petition for a Re-Hearing. This Honorable Court denied a Petition for Writ of Certiorari at 124 S.Ct. 1048(2004).

On May 30, 2002, Mr. Yaracs also filed the Petition for Declaratory Judgment which is the basis of the present proceeding before this Honorable Court. As previously indicated, the Court of Common Pleas of Butler County granted Preliminary Objections based on lack of subject matter jurisdiction due to the federal Consent Order adopting the Settlement Agreement between Summit Academy and Summit Township. That decision has been affirmed by the Commonwealth Court of Pennsylvania and the Supreme Court of Pennsylvania has denied a Petition for Allowance of Appeal.

REASONS FOR GRANTING WRIT

I. THE PENNSYLVANIA STATE COURTS HAVE ERRED IN DISMISSING THE PETITION FOR DECLARATORY JUDGMENT AND REFUSING TO HEAR THE MERITS OF THE PETITION.

A. Petitioner is entitled to due process prior to being deprived of his property rights.

The Pennsylvania state courts' dismissal of Petitioner's Petition for Declaratory Judgment and denial of his right to have the merits of said Petition heard clearly violate Petitioner's due process rights under the Constitution. There is absolutely no question that Petitioner was a party with an interest in the prior state court proceeding with regard to Summit Academy's Building Permit Application. In order to circumvent the state court proceedings, Summit Academy filed the frivolous civil rights federal court action against Summit Township. With the help of a Supervisor who clearly had a financial conflict of interest and who is not permitted under Pennsylvania law to vote on any matter related to Summit Academy, it intimidated one other Supervisor to vote in favor of a Settlement Agreement which clearly was not in the interest of the Township and which in effect mooted Mr. Yaracs' rights in the state court proceeding.

As indicated in the Statement of the Case, Mr. Yaracs filed an appeal to the April 10, 2002 decision of the Zoning Hearing Board related to the Building Permit Application of Summit Academy. The Court of Common Pleas of Butler County granted a Motion to Quash Appeal which was filed by Summit Academy. The Court of Common Pleas of Butler County held that the appeal to the Zoning Hearing Board decision of April 10, 2002 was rendered moot by the entry of the Consent Order incorporating the Settlement Agreement by the United States District Court on May 2, 2002.

The Commonwealth Court of Pennsylvania in affirming the Court of Common Pleas decision stated "Because there was no longer a case or controversy regarding the Academy's Application, and because the Consent Order left the trial court without the power to grant the relief he sought, the trial court correctly determined that Yaracs' appeal was moot and properly

granted the Academy's motion to quash that appeal." In its decision it also stated that a "court will dismiss an appeal as moot unless there is an actual case or controversy at all stages of the judicial or administrative process." It further stated that "an issue may become moot on appeal when there has been an intervening change in the applicable law or facts that deprive the litigant of the necessary stake in the outcome." Finally, it stated that an "appeal should be dismissed as moot when the occurrence of an event renders it impossible for a court to grant the relief requested." It stated that "there is no remaining controversy between the Township and the Academy with respect to the building permit" as that issue had been resolved pursuant to a Consent Order of the federal district court.

In the instant case, the Commonwealth Court affirmed the decision of the Court of Common Pleas of Butler County finding that the Court did not have jurisdiction to void the Agreement between Summit Academy and the Township because the Agreement was adopted by the Federal Court as a settlement to the federal court litigation. The Commonwealth Court in both the instant case and the case resulting from the appeal of the Zoning Hearing Board decision found that the state court could not take action with regard to issues which were the subject of the federal Consent Order.

Both the Supreme Court of Pennsylvania and the Supreme Court of the United States have recognized the ability of cases to be litigated in both Federal and State Court at the same time. See Thompson v. FitzGerald, 329 Pa. 497, 198 A. 58 (1939).

In the case of Goehring v. Harleysville Mutual Casualty Company, 460 Pa. 138, 331 A.2d 457 (1975), the Supreme Court of Pennsylvania held that the trial court erred in granting Preliminary Objections dismissing the state court action on the basis that the federal court had specific jurisdiction over the subject matter of the action. See also Butcher v. Bloom, 415 Pa. 438, 203 A.2d 556 (1964).

The Supreme Court of the United States has held similarly in cases of this nature. In the case of Princess Lida of Thurn and Taxis v. Thompson, 305 U.S. 456, 59 S.Ct. 275, 83 L.Ed. 285 (1939), the Court stated that:

> . . . it is settled that where the judgment sought is strictly in personam, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as res judicata in the other. 305 U.S. at 280.

In the case before this Honorable Court, there is an actual case or controversy at hand. That controversy is whether the Settlement Agreement executed between Summit Academy and Summit Township is void for one of two reasons. Said Agreement was arrived at between Summit Academy and Summit Township through secret negotiations and, in effect, has amended the Zoning Ordinance and Amendments of Summit Township, such that, Summit Academy is not subject to the Summit Township Zoning Ordinance and Amendments. Alternatively, the Settlement Agreement grants Summit Academy a Variance to the Zoning Ordinance. Accomplishing either of these results would have required prior advertising, public notice and public hearings. Secondly, the Settlement Agreement is void because one of the Supervisors who voted in favor of the agreement had an actual financial conflict of interest. Pursuant to the Pennsylvania Official and Employee Ethics Act, the Court has jurisdiction to declare the agreement void.

Further, as stated in the previously cited cases, res judicata can be pleaded only when the parties to the action are the same. Since Wally Yaracs was not a party to the Settlement Agreement or Consent Order entered in the federal court action, res judicata would not apply, and, therefore, this matter should be heard and determined on its merits by the state courts.

In its opinion, the trial court found that it was without power to grant the relief requested by Mr. Yaracs. In support of that statement it cited the case of Wolgin v. State Mutual Investors, 265 Pa.Super. 525, 402 A.2d 669 (1979). In the Wolgin case, the Court of Common Pleas invoked the principle of comity in support of its dismissal of a Complaint where a virtual identical cause of action which had been pursued in Ohio federal courts was pending on appeal. In that case, two federal law suits were initiated in 1975. In July of 1977 a settlement was arrived at by the parties in the two federal law suits and was approved by Order of the District Court in Ohio. The state suit in Pennsylvania was not commenced until 1977 and

the state court was not called to rule upon objections presented until after the Ohio federal cases had been settled.

The primary reason that the Pennsylvania court invoked the principle of comity in the Wolgin case was due to the fact that the federal law suits had been filed two years prior to the state law suit being filed. The issue of whether Summit Academy's Building Permit Application No. 24082 was properly denied by the Summit Township Zoning Officer was at the time of the filing of the federal law suit, already under consideration by the Summit Township Zoning Hearing Board in the state court proceedings. Further, Wally Yaracs, among other individuals, were parties to that proceeding. "Comity" teaches that one court should defer action on causes properly within its jurisdiction until the court of another sovereignty with concurrent powers, and already cognizant of litigation, has had an opportunity to pass upon the matter. Lambert v. Blackwell, 134 F.3d 506, 513 n. 18 (C.A.3d. 1997). The principle of comity supports the conclusion that since the state court proceedings before the Zoning Hearing Board related to Summit Academy's Building Permit Application were pending two years prior to the federal law suit being filed, that the state court proceedings should be concluded and finally decided prior to the federal court taking any action in the law suit which would undermine the state court proceedings.

The Wolgin case does not support the trial court's conclusion in this case. Since the state court proceedings regarding the Building Permit Application were pending for almost two years prior to the Academy filing the federal law suit, comity requires that the remedies in state court be exhausted first. Atlantic Freight Lines v. Pennsylvania Public Utility Commission, 109 F.Supp. 385 (W.D.Pa. 1952). In the instant case, comity dictates that the federal court not be permitted to rule on an issue pending in a state court proceeding. The litigation regarding the Building Permit was pending in the state proceedings long before the federal court case was begun and Wally Yaracs was a party to the state proceedings before the federal court case was filed. Unfortunately, Summit Academy never advised the federal court judge, prior to the entry of the Consent Order that Mr. Yaracs and other individual property owners were parties to the Zoning Hearing Board proceeding related to the Building Permit Application, and therefore, would have been required to be part of any settlement between Summit Academy and the Township in the federal law suit as it relates to

actions on the Building Permit Application. Summit Academy also failed to inform the federal court of the conflict of interest of Supervisor Harold Schnur and the effect of voiding the Settlement Agreement due to the violation of the Pennsylvania Public Official and Employee Ethics Act.

B. Fraud by a Party.

In this case Summit Academy has clearly perpetrated a fraud on the federal courts initially by filing a frivolous civil rights law suit against Summit Township in order to avoid the then pending state court proceeding and by also presenting the Settlement Agreement to the District Court without first advising the Court of the pending litigation before the Summit Township Zoning Hearing Board and the other parties to that proceeding. If the District Court had been made aware of the prior state court proceeding and the effect the Settlement Agreement would have had on the other parties who were included in that litigation, the District Court would have undoubtedly made the other parties aware of the proposed Consent Decree and allowed an opportunity for objection prior to taking any action.

The civil rights Complaint filed by Summit Academy in the federal court in large part related to events occurring in 1996 and 1997. It is well established that claims brought under 42 U.S.C. Section 1983 are subject to the State Statute of Limitations governing personal injury actions. See e.g. Owens v. Okure, 488 U.S. 235, 236 109 S.Ct. 573, 574, 102 L.Ed. 2d. 594 (1989). In Pennsylvania the Statute of Limitations for personal injury actions is two years. 42 Pa. C.S.A. Section 5524; Bougher v. University of Pittsburgh, 882 F.2d 74, 78 (3d Cir. 1989). If in fact, Summit Township was violating Summit Academy's civil rights, it seems that a law suit asserting such would have been filed in 1996 when Summit Academy asserts such action began. While it was not obvious at the time that the law suit was filed on March 28, 2002, it did later become obvious why the law suit was filed at that time.

Subsequent to the filing of the civil rights Complaint, no action was taken by either Summit Academy or Summit Township by the filing of any further papers including an Answer or Response to the Complaint until the Settlement Agreement was presented to the court on May 2, 2002 for adoption as a Consent Decree. At the time that the Settlement Agreement was presented to the District Court, Summit Academy committed another

fraud by failing to advise the District Court Judge that one of the major provisions of the Settlement Agreement, which was approving the Building Permit which was the subject of the litigation before the Summit Township Zoning Hearing Board, would in effect moot that proceeding and that nine other individuals, not parties to the federal court litigation would have their rights adversely affected by the Consent Decree.

Had the district court been aware of the existence of the state court litigation and the effect the Settlement Agreement would have on said litigation, the Judge may have required the consent of, of at least notice to, the nine other parties prior to the adoption of the Consent Decree. Unfortunately, Summit Academy never advised the District Court Judge of the existence of the state court litigation or the other nine individuals who were parties to that litigation prior to requesting the Court to sign the Consent Decree. Unfortunately, neither the District Court, the Court of Appeals for the Third Circuit nor this Honorable Court have rectified this fraud and Petitioner's rights have been violated because of it. Petitioner urges this Honorable Court to grant the Petition for Writ of Certiorari so that the merits of the Petition for Declaratory Judgment can be heard.

C. The Settlement Agreement in This Matter Should Have Been Declared Void by the State Courts.

1. The Summit Township Supervisors improperly ratified the Settlement Agreement due to a conflict of interest.

Summit Academy has admitted that Larry Schnur, the son of Supervisor Harold Schnur farms approximately 15 acres of property owned by Summit Academy. They further admit that Larry Schnur farms the property belonging to them at no charge. 65 Pa.C.S.A. Section 1102 of the Public Official and Employee Ethics Act of Pennsylvania provides that a conflict of interest for a public official includes use by a public official of the authority of his office for the private pecuniary benefit of himself, a member of his immediate family or a business with which he or his immediate family is associated. In that section, "immediate family" is defined as a parent, spouse, child, brother or sister. Section 1103(a) of that Act provides that no public official shall engage in conduct that constitutes a conflict of interest.

In the instant case, Harold Schnur neither abstained from voting nor revealed to the Board of Supervisors his conflict of interest either orally or in writing as required by this Statute. It is clear that he would have been required to abstain from the vote on the Settlement Agreement. Further, had he revealed his conflict of interest, the other vote in favor of the Settlement Agreement which was cast by Supervisor John Oesterling, may, in fact, have changed. Mr. Oesterling is the same Supervisor who changed his mind with regard to initially stating he intended to vote in favor of a prior Settlement Agreement with Summit Academy but ultimately voting against the proposed Settlement Agreement with Summit Academy in February of 2001. Since Supervisor Schnur did not reveal his conflict of interest, under no circumstance is he permitted to vote. Therefore, the Pennsylvania state courts should have declared the Settlement Agreement void since it was not properly adopted by the Summit Township Supervisors.

2. The Settlement Agreement in effect has either amended the Zoning Ordinance or granted a Variance in favor of Summit Academy.

The effect of the Settlement Agreement has resulted in either an Amendment to the Zoning Ordinance or a Variance being granted to Summit Academy. The present Zoning Ordinance in Summit Township only permits 350 juvenile offenders to reside at a facility such as the one owned by Summit Academy. If Summit Academy wanted to challenge that Ordinance, it could have done so legally pursuant to the Pennsylvania Municipalities Planning Code and through the Courts. It did not do so. Further, if Summit Academy wanted to obtain a Variance from Summit Township in order to permit more than 350 juvenile offenders to live at their site, they could have done so by filing a request for Variance pursuant to the provisions of the Summit Township Zoning Ordinance and the Pennsylvania Municipalities Planning Code. They have not done that either. In order to either challenge the present Zoning Ordinance, grant a Variance or amend the present Zoning Ordinance, public notification through advertising and public hearings would have been required to be held.

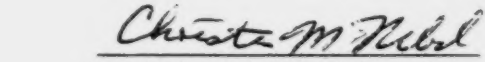
Summit Academy chose to file the federal law suit in order to have the same result accomplished without having any of the residents of Summit Township have any input into these actions being taken and by having a

secret agreement drawn up within the course of five weeks after they filed their law suit. The provisions of the Settlement Agreement clearly have the effect of either amending the Ordinance or granting a Variance to Summit Academy. To argue otherwise is ludicrous. To not allow Mr. Yaracs to have a hearing on the merits of the Petition for Declaratory Judgment in this matter, would not allow any public participation in a very significant change to the makeup of the zoning of Summit Township. Summit Academy has all of the protections of the laws of Pennsylvania to attempt to either amend the Zoning Ordinance or obtain a Variance if it wants to have more residents than the present ordinance allows. Summit Academy should not be permitted to do something that it either could not do or did not want to go through the proper procedures through the Pennsylvania courts.

CONCLUSION

WHEREFORE, Petitioner, Wally Yaracs , requests of this Honorable Court that it grant his Petition for Writ of Certiorari to the Supreme Court of Pennsylvania.

Respectfully submitted,



Christine M. Nebel, Esquire
Counsel of Record
220 South Washington Street
Butler, PA 16001
(724)285-1462

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

WALLY YARACS,	:	No. 177 WAL 2004
	:	
Petitioner	:	
	:	Petition for Allowance of
	:	Appeal from the Order of
	:	the Commonwealth Court
v.	:	
	:	
SUMMIT ACADEMY AND	:	
C.S.C. ACADEMY, INC.,	:	
THE TOWNSHIP	:	
OF SUMMIT, BUTLER	:	
COUNTY,	:	
	:	
Respondents	:	

ORDER

PER CURIAM

AND NOW, this 26th day of August, 2004, the Petition for Allowance of Appeal is hereby DENIED.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Wally Yaracs,	:	
Appellant	:	
	:	No. 2448 C.D. 2004
v.	:	Argued: February 3, 2004
	:	
Summit Township and C.S.C. Academy, Inc., The Township of Summit, Butler County,	:	

BEFORE: HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION BY JUDGE FRIEDMAN FILED: March 2, 2004

Wally Yaracs (Yaracs) appeals from the January 14, 2003, order of the Court of Common Pleas of Butler County (trial court), which sustained the preliminary objections filed by Summit Academy and C.S.C. Academy, Ind. (together, the Academy) and dismissed Yaracs' amended petition for declaratory judgment (Petition) based on a lack of subject matter jurisdiction. We affirm.

In 1996, the Academy purchased property in Summit Township (Township) for use as a residential juvenile correction facility. At the time, the Township had no zoning ordinance pertaining to land use. However, the

Summit Township Board of Supervisors (Supervisors) subsequently enacted a zoning ordinance (Ordinance) that ostensibly prohibited the Academy's proposed use of the property; consequently, the Township sent a Notice of Violation to the Academy. Following an appeal by the Academy, the Summit Township Zoning Hearing Board (Board) ultimately dismissed the Notice of Violation, concluding that the Academy's use of the property as a residential juvenile correction facility was a legal nonconforming use with the constitutional right to expand. The Township appealed this decision to the trial court, which affirmed the Board. The Township later appealed, then withdrew its appeal, to the Commonwealth Court, and the trial court's decision became final.

On March 13, 2000, the Academy filed Building Permit Application No. 24082 (Application 24082), seeking to construct two dormitories on its property. The Township's Zoning Officer denied Application 24082, and the Academy appealed the denial to the Board. (Petition at ¶8.) Meanwhile, the Township voted to amend the Ordinance, limiting the number of residents in certain institutional uses, such as juvenile detention or correctional facilities, to 350 residents. (Petition at ¶14.) A hearing on the appeal from the denial of Application 24082 was held before the Board on

January 21, 2002. Yaracs was one of nine Township residents that entered an appearance. (Petition at ¶¶10-11.)

On March 28, 2002, prior to the Board's decision regarding Application 24082, the Academy filed a civil rights action against the Township in federal district court, alleging, inter alia, that the Township engaged in a pattern and practice of arbitrary and irrational government action motivated by bias, bad faith and the intent to harass the Academy because of its ;use of the property as a residential juvenile correctional facility. (Petition at ¶¶1-6, 9, 12.)

On April 10, 2002, the Board met and issued a decision on the Academy's appeal from the denial of Application 24082, holding that the building permit was deemed approved in favor of the Academy because the Zoning Officer's decision had been rendered 106 days after Application 24082 was filed. The Board further found that, even if the Academy were not entitled to a deemed approval, the reasons for denial given by the Zoning Officer were "inadequate and erroneous." (Petition at ¶13.)

The parties subsequently engaged in settlement negotiations to

resolve the six-year-long dispute between the Township and the Academy. During these negotiations, the Supervisors made a settlement proposal to the Academy and prepared a Resolution, authorizing execution of a written settlement agreement (Agreement) and a Consent Order incorporating the Agreement, to settle the federal civil rights litigation between the parties. Among other things, the Agreement called for the approval of Application 24082 and issuance of the Academy's disputed building permit; the Agreement also included a schedule allowing the Academy to expand its population to 1,200 residents by the year 2013.

On May 1, 2002, at a public meeting of the Township Supervisors, Supervisor Harold Schnur (Supervisor Schnur) moved to adopt the Resolution/Agreement to settle the federal lawsuit. The Resolution passed; two Supervisors, including Supervisor Schnur, voted in favor of the Resolution and one Supervisor abstained. (Petition at ¶¶15-16.) On May 2, 2002, the Consent Order incorporating the Agreement was entered by the federal district court, settling the civil rights litigation between the parties.[1]

[1]On May 10, 2002, Yaracs filed an appeal with the trial court from the April 10, 2002, decision of the Board. On February 14, 2003, the trial court granted a motion filed by the Academy to quash the appeal, determining that Yaracs' appeal was rendered moot by the May 2, 2002, entry of the federal Consent Order incorporating the Agreement. Yaracs appealed to this court from the trial court's order, and we affirmed. (See Petition at ¶¶20-21, 29.)

(Petition at ¶¶17, 30-32; R.R. at 40a-49a.)

On May 31, 2002, Yaracs filed a petition for declaratory judgment,[2] to which the Academy filed preliminary objections. On July 12, 2002, Yaracs filed his amended Petition for declaratory judgment in the trial court, requesting that the trial court declare void the Agreement adopted by the Township Supervisors on May 1, 2002. Yaracs maintains that, through the Agreement, the Township effectively grants an illegal zoning Ordinance amendment or variance.[3] Yaracs further maintains that the Agreement is

---

[2]On that same date, Yaracs also filed a petition to intervene in the settled federal action and a petition to vacate the Consent Order. (Petition at ¶¶42-44.) The district court denied Yarac's petition to intervene, (R.R. at 187a-98a), and, with emphasis on the untimeliness of the petition, the Court of Appeals for the Third Circuit affirmed the district court by order dated June 5, 2003. A petition for rehearing filed by Yaracs was denied on July 11, 2003. Recently, the United States Supreme Court denied Yaracs' petition for writ of certiorari. Yaracs v. Summit Academy, U.S. , 124 S.Ct. 1048 (2004).

Also on May 31, 2002, Yaracs filed an appeal to the Board from the Supervisors' decision to grant the Permit to the Academy pursuant to the Agreement and Consent Order. Following a public hearing on July 24, 2002, the Board determined that it was without jurisdiction to hear Yaracs' appeal. By order dated January 16, 2003, the trial court affirmed the Board decision. Yaracs appealed the trial court's decision to this court, and we also affirmed the Board.

[3] Yaracs contends that the Agreement effectively amends the Township Ordinance or grants a variance to the Academy by allowing the Academy to house 1,200 juvenile offenders at the site, although similarly situated property owners are limited by the Ordinance to having 350 juvenile residents. Yaracs maintains that the amendment of a zoning ordinance or the grant of a variance require prior advertising, public notice and a public hearing; therefore, the Academy and the Township circumvented the law by adopting the Agreement without following these procedures. (Petition at ¶¶23-26.)

invalidated by the actions of Supervisor Schnur, who Yaracs alleges was required to abstain from voting on the Agreement due to a conflict of interest in the matter.

On August 1, 2002, the Academy filed preliminary objections to Yaracs' amended Petition, seeking dismissal of the Petition on the grounds that: (1)the trial court lacked subject matter jurisdiction. (P.O.s at ¶¶18-23; and /or (2) Yaracs' claims are legally insufficient, (P.O.s at ¶¶25-33). (R.R. at 131a-36a.) Following oral argument, the trial court issued an opinion and order, dated January 14, 2003, sustaining the preliminary objections based on a lack of subject matter jurisdiction over Yaracs' Petition. Specifically, the trial court stated that it has "no jurisdiction to hear any matters concerning this [federal] Consent Order." (Trial ct. op. of January 14, 2003, at 4, Yaracs' brief at Appendix 1.)[4] Yaracs now appeals

[4]The trial court issued a subsequent opinion on March 5, 2003, pursuant to Pa. R.A.P. 1925(a), to address Yaracs' complaint that the trial court had ruled on its jurisdiction to overturn the Consent Order when what actually was before the trial court was Yaracs' request to declare the Agreement void. The trial court reminded Yaracs that the Agreement was incorporated into the Consent Order and stated, "Thus in seeking to have this Settlement Agreement declared void, [Yaracs] sought to have this Court declare a portion of the Consent Order void and enjoin an agreement arrived at and approved by Federal Court. State courts are clearly without power to take such action." (Trial ct. op. of March 5, 2003, at 2, Yaracs' brief at Appendix 1.)

to this court,[5] arguing that the trial court erred in dismissing the Petition.

According to Yaracs, the trial court had jurisdiction to void the Agreement between the Academy and the Township notwithstanding the fact that the Agreement is incorporated in the federal Consent Order, which finally settled the federal civil rights brought by the Academy against the Township. Because a determination voiding the Agreement clearly would contravene the Consent Order, the trial court is without authority to make such a determination. Wolgin v. State Mutual Investors, 402 A.2d 669 (Pa. Super. 1979).

In Wolgin, shareholder derivative suits were initiated in federal court and while the suits were pending, a shareholder commenced suit in common pleas court seeking injunctive relief to prevent implementation of a settlement agreement approved by the district court. The common pleas

---

[5]Where a case is dismissed at the preliminary objections stage on issues of law, the appellate scope of review is plenary. Belser v. Rockwood Casualty Insurance Co., 791 A.2d 1216 (Pa. Super. 2002). When reviewing an order granting preliminary objections in the nature of a demurrer, all material facts set forth in the complaint as well as all inferences reasonably deducible therefrom must be accepted as true. The question presented by the demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible. Where a doubt exists as to whether a demurrer should be sustained, this doubt should be resolved in favor of overruling the demurrer. Price v. Brown, 545 Pa. 216, 680 A.2d 1149 (1996).

court refused to accept jurisdiction in the matter, applying the principle of comity to justify dismissal of the complaint. Our superior court affirmed, concluding that a state court has no power to enjoin a settlement arrived at and approved in federal court. Id. The court cited Donovan v. City of Dallas, 377 U.S. 408 (1964), in which the United States Supreme Court held that state courts are completely without power to restrain federal court proceedings in in personam actions. The court, in Wolgin, then determined that the precedent set forth in Donovan clearly "forbids injunctions which seek to enjoin parties from effectuating a decree or settlement arrived at in federal court." Wolgin, 402 A.2d at 673. In addition, the court noted that Pennsylvania courts will defer to the Federal Courts whenever necessary to maintain harmony. Id.

Yaracs attempts to distinguish Wolgrin on the ground that the state suit in that case was instituted subsequent to the federal court action, whereas, here, the Academy filed its federal suit at a time when the issue of the Academy's building Permit already was under consideration by the Board in state court proceedings. However, at the time the Township and the Academy entered the Agreement, there was no pending state action. Yaracs subsequently filed his Petition seeking to have the trial court void the

Agreement incorporated into the Consent Order. As the trial court here correctly held, once the Consent Order had been entered, a conflicting state order was impermissible. Wolgin.

Nevertheless, Yaracs argues that, in accordance with the principle of comity, as discussed in Wolgrin, the federal district court should have deferred action on the Academy's lawsuit until all state court proceedings related to Application 24082 were concluded. We disagree.

"Comity' used in the legal sense, is not a rule of law, but a principle, given effect out of deference and respect for the actions of courts of other jurisdictions." Id. At 672. The doctrine of comity teaches that one court should defer action on causes properly within its jurisdiction until the court of another sovereignty with concurrent powers, and already cognizant of litigation, have had an opportunity to pass upon the matter. Lambert v. Blackwell, 134 F.3d 506 (3d Cir. 1997). A question of comity arises when there is "tension...between courts and/or agencies having concurrent jurisdiction over the same matter." Pennsylvania State Troopers' Association v. Pennsylvania Laor Relations Board, 671 A.2d 1183, 1187 (Pa. Cmwlth.), appeal denied, 545 Pa. 657, 680 A.2d 1164 (1996).

In Wolgin, the Superior Court held that the common pleas court properly invoked the principle of comity to justify dismissing a complaint where a virtually identical cause of action was pending on appeal in federal court, and the relief sought in the state court action would severely interfere with the ongoing federal action. However, in the present case, the matter brought before the federal district court was not the same as the state action on the building permit dispute. The Academy's action before the federal district court alleged a violation of the Academy's rights to equal protection and due process of law, over which the district court had original jurisdiction. Thus, Yaracs' argument that the federal court action should have been deferred until state court proceedings on the building permit had ended is without merit.

Moreover, in Morning Call, Inc. v. Lower Saucon Township, 627 A.2d 297 (Pa. Cmwlth. 1993), this court recognized that where, as here, a matter has been settled in federal court by order in accordance with Fed. R. Civ. P. 41(a)(2), the federal court retains continuing jurisdiction, and the state court lacks jurisdiction. Morning Call at 297 n.4. Consequently, any attack by Yaracs on the validity of the Consent Order must be addressed before that same federal court. O'Burn V. Shapp, 70 F.R.D. 549 (E.D.Pa.),

aff'd, 546 F.2d 417 (3d Cir. 1976). In fact, by filing his petition to intervene and vacate the Consent Order, Yaracs attempted to obtain relief in the federal district court. However, as indicated, the district court denied Yaracs' petition, and Yaracs' appeals from this decision all have failed. Yaracs' present attempt to collaterally attack the Consent Order in state court likewise must fail.

Before this court, Yaracs also renews his argument that he did not ask the trial court to declare the Consent Order void but, rather, simply asked the trial court to make a legal determination as to the validity of the Agreement pursuant to Pennsylvania law. Yaracs stresses that, in seeking this relief, he did not request the trial court to overturn a federal court Consent Order. He states, "Ultimately, what the Federal Court may do with such a decision is up the Federal Court." (Yaracs' brief at 16.) Yaracs' argument clearly is unsound. As recognized by the trial court, voiding the Agreement would necessarily void a portion of the Consent Order, and, thus, enjoin the federally approved settlement. As stated, state courts cannot do this, Wolgrin; General Atomic Co. V. Felter, 436 U.S. 493 (1978), and,

therefore, the trial court properly dismissed Yaracs' Petition.[6]

---

[6]Although we hold that the trial court properly dismissed the Petition based on a lack of subject matter jurisdiction, we note our agreement with the Academy that Yaracs' Petition also failed to state a claim justifying his request for declaratory relief. Yaracs first claimed that the Agreement should be declared void due to a purported illegal zoning Ordinance amendment and/or a purported illegal variance granted by the Township. However, Pennsylvania courts have long held that court approved settlements of zoning cases are lawful. See Council of Borough of Monroeville v. Al Monzo Construction Co., 289 A.2d 496 (Pa. Cmwlth. 1972). Further, courts recognize that such settlements are distinct from zoning variances even though such settlements may result in a departure from the ordained zoning pattern. Summit Township Taxpayers Association vs. Summit Township Board of Supervisors, 411 A.2d 1263 (Pa.Cmwlth. 1980) (holding that court -approved settlements of zoning disputes are favored and lawful and are distinct from grants of variances).

According to Yaracs, Supervisor Schnur, who made the motion to ratify, and voted in favor of, the proposed Agreement, had a conflict of interest with respect to the matter because, in the past, Schnur farmed land that now is owned by the Academy, and Schnur's son continues to farm fifteen to eighteen acres of the Academy's property. Yaracs maintains that, pursuant to section1103(j) of the Public Official and Employee Ethics Act (Ethics Act), 65 Pa. C.S. ¶1103(j), Supervisor Schnur was required to disclose the conflict of interest and abstain from voting. Yaracs contends that without Supervisor Schnur's vote, the Agreement would not have passed. (Petition at ¶¶33-41.). Moreover, Yaracs asserts that, because of Supervisor Schnur's Ethics Act violation, the trial court had jurisdiction to void the Agreement pursuant to section 1103(f) of the Ethics Act, 65 Pa. C.S. ¶1103(f). Yaracs' argument is fatally flawed.

To have a conflict of interest under the Ethics Act, the individual with the alleged conflict must have used or attempted to use the authority of his office for private pecuniary benefit for himself or a member of his immediate family. 65 Pa. C.S. ¶1102. Here, Yaracs, has alleged no facts to show how Supervisor Schnur's vote would advance his pecuniary interests in any measurable way. Moreover, even assuming that a conflict of interest did exist, the Ethics Act does not authorize a court to void the public official's vote as one of the enumerated punishments for violating the conflict of interest provision. Salem Township Municipal Authority v. Township of Salem, 820 A.2d 888 (Pa. Cmwlth. 2003). Finally, contrary to Yaracs' assertion, section 1103(f) of the Ethics Act did not give the court jurisdiction to void the Agreement. Section 1103(f) of the Ethics Act prohibits the making of a contract between the public officialand the governmental body for the acquisition, use or disposal by the governmental body, for services, supplies, land or other property. 65 Pa. C.S. ¶¶1102 and 1103(f). That does not describe this Agreement between the Academy and the Township.

s. Rochelle S. Friedman
ROCHELLE S. FRIEDMAN,
Judge

IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY, PENNSYLVANIA

WALLY YARACS, EQ No. 02-50023

Plaintiff,

v.

SUMMIT ACADEMY, and C.S.C. ACADEMY INC., THE TOWNSHIP OF SUMMIT, BUTLER COUNTY,

Defendants.

January 14, 2003

For Plaintiff: Christine M. Nebel, Esq.

For Summit Township and C.S.C. Academy Inc.: James H. Norris, Esq.

Judge: William R. Shaffer

MEMORANDUM OPINION AND ORDER OF COURT

Before the Court are Defendants Summit Academy and C.S.C. Academy, Inc.'s Preliminary Objections to Plaintiff's Amended Petition for Declaratory Judgment. For the reasons set forth below the Objections are sustained.

On March 13, 2000 Defendants Summit Academy and C.S.C.

Academy, Inc. (hereinafter "Academy") filed a Building Permit Application with the Zoning Officer of Summit Township. The Summit Township Zoning Officer denied this Application on June 27, 2000. The Academy appealed the denial and a hearing was held before the Summit Township Zoning Hearing Board (hereinafter "Board") on January 21, 2002. At the time of this hearing nine individual residents of Summit Township, including the Plaintiff in the present case, filed an Appearance. On April 10, 2002, the Board met to deliberate and issue a decision on the appeal filed by the Academy. The Board held that the building permit was deemed approved in favor of the Academy. The Plaintiff in the present case filed an Appeal to this decision, which is currently pending before this Court.

Prior to the Board's decision, the Academy filed a civil rights complaint against the Township in the United States District Court for the Western District of Pennsylvania on March 28, 2002. A Settlement proposal was made by the Township's Supervisors to the Academy and a Resolution was prepared authorizing execution of a written Settlement Agreement and Consent Order between the parties. On May 1, 2002 Supervisor Harold Schnur made a Motion to Adopt the Resolution at a Board of Supervisors Meeting. This Resolution included, among other

things, the granting of the disputed Building Permit and a schedule for increasing the maximum number of students at the Academy. The Supervisors voted to adopt the Resolution and on May 2, 2002 the Consent Order incorporating the Settlement Agreement was entered by the Honorable Donetta Ambrose of the United States District Court for the Western District of Pennsylvania.

On May 31, 2002, Plaintiff filed a Petition for Declaratory Judgment. The Academy filed Preliminary Objections to this Petition. On July 12, 2002, Plaintiff filed an Amended Petition for Declaratory Judgment. In this Amended Petition Plaintiff requests that this Court declare void the Settlement Agreement incorporated in the Consent Order entered by the United States District Court. The Academy filed Preliminary Objections to this Amended Petition for Declaratory Judgment.

The Academy's first Preliminary Objection is that this Court lacks subject matter jurisdiction to consider the Plaintiff's request to declare the Consent Ordered entered by the United States District Court to be void. The Academy asserts that when an action filed in federal court is settled by order of court, the federal court retains jurisdiction and the state court is without jurisdiction. The Academy further argues

that Plaintiff's request for declaratory relief is precluded by the principle of comity.

In support of its argument, the Academy points to Wolgin v. State Mutual Investors, 402 A.2d 669 (Pa.Super. 1979). In this case the Superior Court found that a state court is without power to enjoin a settlement arrived at and approved in federal court. Id. At 673. In Donovan v. City of Dallas, 377 U.S. 408 (1964), the United States Supreme Court held that state courts are completely without power to restrain federal court proceedings in in personam actions. The Wolgin court determined that this precedent clearly prohibited injunctions which seek to enjoin parties from effectuating a decree or settlement arrived at in federal court. Wolgin at 673.

Plaintiff asserts that the Wolginn case is not on point, due to the fact that in that case the state court action was instituted after the federal court action. However, the action that is now before the Court was brought by Plaintiff to obtain a declaratory judgment voiding the Settlement Agreement incorporated in the Consent Order, which was entered by the United States District Court. Thus, it is obvious that this action commenced after the federal action began, just as in the Wolgin case. Thus, pursuant to the precedent set forth in Wolgin, this Court is

without power to void the Settlement Agreement incorporated into the Consent Order entered by the United States District Court.

Furthermore, the Pennsylvania Commonwealth Court clearly set forth in Morning Call, Inc. v. Lower Saucon Twp., 627 A.2d 297, 298 (Pa.Cmwlth. 1993), that when a case is settled in federal court by the entering of a consent order, the federal court retains continuing jurisdiction. Consequently, any attack on the validity of the consent order must be addressed before that same federal court. O'Burn v. Sharp, 70 F.R.D. 549 (E.D. Pa. 1976). In accordance with this precedent Plaintiff in the present case sought relief from the Consent Order in the Federal Court, which entered the Order. Plaintiff filed with the United States District Court for the Western District of Pennsylvania, a Petition to Intervene and a Petition to Vacate the Consent Order. The District Court found that Plaintiff did not have a significant and qualifying interest in the action and that what little interest Plaintiff did have in the case was adequately represented by Summit Township. Thus, the District Court ruled that Plaintiff had no right to intervene in the case and therefore, had no basis on which to request that the Consent Order be vacated. Plaintiff now turns to this Court to void the Settlement Agreement incorporated in the Consent

Order. However, pursuant to the precedent set forth in O'Burn and Morning Call this Court has no jurisdiction to hear any matters concerning this Consent Order.

Plaintiff further argues that in accordance with the principle of comity the Federal Court action should not have been instituted until all State Court proceedings regarding the Building Permit Application had finished. A question of comity arises when there is "tension ... between courts and/or agencies having concurrent jurisdiction over the same matter." Pennsylvania State Troopers' Ass'n v. Pennsylvania Labor Relations Bd., 671 A.2d 1183, 1187 (Pa. Cmwlth 1996). The principle of comity is given effect out of deference and respect for the action of courts of other jurisdictions. Wolgin V. State Mutual Investors, 402 A.2d 669, 672 (Pa. Super. 1972). Technically it means where one authority gives way to another. Id. However, in the present case the matter that was brought before the United States District Court is not the same as the Building Permit Appeal that was pending before this Court. Defendants brought a civil action before the United States District Court, alleging a violation of their rights to equal protection and substantive due process of law. Pursuant to 28 U.S.C. ¶¶1331 and 1343, the United States District Court had original jurisdiction over this action. Thus,

Plaintiff's argument that the Federal Court action should not have been instituted until all State Court proceedings regarding the Building Permit had finished is clearly without merit.

Accordingly, the Academy's Preliminary Objections are sustained. This Court lacks subject matter jurisdiction over Plaintiff's Amended Petition For Declaratory Judgment and therefore, the Petition is to be dismissed.

IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY, PENNSYLVANIA

WALLY YARACS, EQ No. 02-50023

Plaintiff,

v.

SUMMIT ACADEMY, and C.S.C. ACADEMY INC., THE TOWNSHIP OF SUMMIT, BUTLER COUNTY,

Defendants.

ORDER OF COURT

AND NOW, this 14th day of January, 2003, upon consideration of Defendant Summit Academy and C.S.C. Academy, Inc.'s Preliminary Objections to Plaintiff's Amended Petition for Declaratory Judgment, it is hereby Ordered that the Objections are sustained and Plaintiff's Petition is dismissed.

By the Court,

s. William R. Shaffer
William R. Shaffer, Judge

01/15/03 Copies of Memorandum Opinion & Order of Court To:
Christine Nebel
Kathryn Hunter-James Roberts-James Norris
Victor 'Delle' Donne

IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY, PENNSYLVANIA

WALLY YARACS, EQ No. 02-50023

Plaintiff,

v.

SUMMIT ACADEMY, and C.S.C. ACADEMY INC., THE TOWNSHIP OF SUMMIT, BUTLER COUNTY,

Defendants.

March 5, 2003

For Plaintiff: Christine M. Nebel, Esq.

For Summit Township and C.S.C. Academy Inc.: James H. Norris, Esq.

Judge: William R. Shaffer

MEMORANDUM OPINION PURSUANT TO Pa.R.A.P. 1925(A)

And Now, this 5th day of March, 2003, Appellant Wally Yaracs having filed a Concise Statement of Matters Complained of on Appeal, the Memorandum Opinion and Order of Court dated January 14, 2003 are incorporated herein, with regards to Plaintiff's first matter complained of on appeal. Regarding, the second matter complained of, the Court has added additional comments.

Appellant complains in the second matter of his Concise

Statement that the Court ruled on an issue that was not before it. Appellant asserts that he requested that the court declare the Settlement Agreement of May 1, 2002 void, and the Court ruled instead that it did not have jurisdiction to overturn a Consent Order entered in Federal Court. In responding to this allegation the Court first notes that the Settlement Agreement of May 1, 2002 was incorporated into the May 2, 2002 Consent Order entered by the Honorable Donetta Ambrose of the United States District Court for the Western District of Pennsylvania. Thus, in seeking to have this Settlement Agreement declared void, Appellant sought to have this Court declare a portion of the Consent Order void and enjoin an agreement arrived at and approved by Federal Court. State courts are clearly without power to take such actions. Wolgin v. State Mutual Investors, 402 A.2d 669,673 (Pa.Super. 1979); General Atomic Co. v. Felter, 436 U.S. 493, 496 (1978). Consequently, the Court ruled that it did not have the power to void the Settlement Agreement, and therefore, lacked jurisdiction to consider Appellant's request. Thus, the Court correctly ruled on an issue that was properly before it.

By the Court,

s. William R. Shaffer
William R. Shaffer, Judge